IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

Date of decision: 14.12.2006.

Devinder Kumar Vs. State of Punjab

CORAM: Hon'ble Mr. Justice Virender Singh

Present: Ms. Tanu Bedi, Advocate, for the appellant.

Mr. M.S. Sidhu, Sr. DAG, Punjab.

Virender Singh, J.

Appellant Devinder Singh son of Balu Ram son of Chuni Ram (Labourer), resident of village Gowardhan Niwas, Tehsil Mandalgarh, District Bilwara (Rajasthan) stands convicted vide impugned judgment of learned Special Judge, Ferozepur dated 3rd February, 1999, under Section 18 of Narcotic Drugs and Psychotropic Substances Act (for short 'the Act') for allegedly keeping in his conscious possession one kilogram of opium without any valid permit or licence on 20.2.1998 when he was apprehended by the police. He has been sentenced to undergo R.I. for ten years and to pay a fine of Rs.1.00 lac, in default thereof to further undergo R.I. for one year. Aggrieved by the same, he has preferred the instant appeal.

In brief, the case of the prosecution is that on 20.2.1998

ASI Tara Singh (PW3), then posted as Incharge of Police Post Fatehgarh Panjoor along with Head Constable Raghbir Singh (PW2) and other police officials was going from village Awan to village Wara Pohwind in a Government Canter for patrolling and checking of suspected persons. When at about 9.15 A.M. the police party reached near the bridge of canal minor in the area of village Wara Pohwind, he noticed two persons sitting on the side walls of the bridge who on seeing the police van went in different directions. Both were, however, apprehended by the police. ASI Tara Singh noticed that the appellant had tied something in Parna around his waist. He suspected that he was carrying some contraband article. Consequently, the appellant was informed by ASI Tara Singh of his statutory right as envisaged under Section 50 of the Act of getting himself searched and in this regard a consent memo Ex.P1 was prepared which was signed by the appellant and attested by Head Constable Raghbir Singh (PW2) and another Head Constable Gurnam Singh. Since the appellant had opted for the search to be conducted before a Gazetted Officer, a wireless message was flashed to Shri Nachattar Singh, Deputy Superintendent of Police Zira (PW4) who reached the spot after some time. He also complied with the provisions of Section 50 of the Act and introduced himself as a Gazetted Officer and told that the appellant could get his search conducted before a Magistrate if he so liked. However, the appellant agreed to get himself searched before the DSP. A consent memo Ex.P2 was prepared which was

signed by the appellant and the aforesaid witnesses and DSP Nachhattar Singh. Thereafter, the search was conducted and opium wrapped in a glazed paper tied around the waist of the appellant with the help of Parna was recovered. Out of that quantity, 10 grams of opium was separated as sample and put in a tin Dibba (box). The remaining opium when weighed was found to be 990 grams. It was separately sealed by ASI with his seal bearing impression 'TS' and with the seal of DSP Nachhattar Singh bearing impression 'NS'. All these articles were taken into possession vide memo Ex.P3 which was attested by the police officials. The personal search of the appellant was also conducted. A ruqa was sent on the basis of which formal FIR Ex.PB was recorded. Rough site-plan Ex.P9 was also prepared at the spot. After apprising the appellant of the grounds of arrest vide memo Ex.P5, he was formally arrested. On return to the Police Station the case property was deposited before SHO Darshan Singh (PW5) who sealed the tin Dibba (box) carrying the main bulk and the specimen of sample with his seal bearing impression 'DS'. The case property was then taken into possession vide memo Ex.P6 which was attested by the police officials. On the next day i.e. 21.2.1998 SHO Darshan Singh produced the case property before the Sub Divisional Judicial Magistrate Zira and moved an application Ex.P1 on which orders Ex.P11/A were passed for keeping the case property in the Malkhana. The sample was sent to the Chemical Examiner for analysis and after receipt of the report, the challan was filed against

the appellant. Charge under Section 18 of the Act was framed against him.

The prosecution in order to substantiate the charge against the appellant had produced Constable Balwinder Singh (PW1) who on 9.3.1998 had taken the sample along with the specimen of seal to the analyst, Head Constable Raghbir Singh (PW2) the witness to the recovery, ASI Tara Singh (PW3) the investigating officer and again a witness to the recovery, DSP Nachhattar Singh (PW4) who was called at the spot is another witness to the recovery and Darshan Singh (PW5) the then SHO of Police Station Zira who has proved the compliance of Section 55 of the Act.

The plea taken by the appellant as emerges from his statement under Section 313 Cr.P.C. is of false implication pleading that no incriminating article was recovered from his possession. He, however, did not lead any defence evidence.

After appreciating the entire case of the prosecution, the learned trial Court has convicted and sentenced the appellant as stated above.

I have heard Ms. Tanu Bedi, learned counsel for the appellant and Mr. M.S. Sidhu, Sr. DAG Punjab. With their assistance I have gone through the entire record minutely.

Ms. Bedi sets-score by one vital flaw in the case of the prosecution submitting that Section 50 which is admittedly attracted in this case has not been complied with by ASI Tara Singh, the

Investigating Officer strictly according to the statute, inasmuch as when the appellant was suspected of carrying some contraband, the offer should have been as to whether he wanted to get his search effected in the presence of a gazetted officer or a Magistrate whereas in the present case the initial notice/memo Ex.P1 reflects that ASI Tara Singh asked the appellant as to whether he wanted to get himself searched through him (Investigating Officer) or some Gazetted Officer or a Magistrate. The learned counsel submits that adding his own name for the purposes of conducting the search, is not warranted according to law and, therefore, legally it cannot be said to be a complete offer strictly according to the mandate of Section 50 of the Act. Dwelling her arguments on this aspect, Ms. Bedi further contends that may be DSP Nachhattar Singh was subsequently called at the spot and he too had made an attempt to comply with the provisions of Section 50 of the Act after giving him the notice but the same would be of no advantage to the prosecution as the initial offer which sets the investigation into motion should have been strictly adhered to according to the provisions of the Act. Dwelling upon her arguments, the learned counsel then contends that it has been repeatedly held by the Hon'ble Apex Court that the provisions of Section 50 of the Act wherever they are attracted, according to the facts of the case, are mandatory in nature and non-compliance thereof would render the recovery of the contraband as doubtful.

Ms. Bedi then submits that there is another infirmity in

the case of the prosecution with regard to the link evidence. She contends that no doubt a specimen seal impression chit Ex.PM/1 was allegedly prepared at the spot which bear the seal impression of the Investigating Officer and DSP and thereafter also of SHO Darshan Singh but Form No.29 was neither filled up at the spot nor deposited in the Malkhana. The report of the Chemical Examiner Ex.P10 indicates that the seal impression chit is just pasted on form No.29 which was subsequently prepared on 9th of March, 1998 for the purposes of depositing the sample with the analyst. In the present case all the seals remained with the police officials as is clear from the evidence and, therefore, chances of tampering with the case property cannot be ruled out. Ms. Bedi then submits that on 21.2.1998 SHO Darshan Singh had produced one parcel of 10 grams (sample parcel) and other parcel of 990 grams of the remainder before the Ilaqa Magistrate as is clear from his application Ex.P11 or the order Ex.P11/A of the even date passed thereon. But there is no reference even in the application or the order that along with the aforesaid two articles, specimen impression seal chit was also produced. From this fact also, the learned counsel develops that once SI/SHO Darshan Singh had kept the entire case property with him along with the seal impression chit, the chances of tampering with the same can not be ruled out and this weakness is also fatal to the prosecution.

Primarily on the aforesaid submissions, Ms. Bedi prays

for acquittal of the appellant.

Controverting the submissions advanced by the learned counsel for the appellant, Mr. Sidhu, Senior Deputy Advocate General submits that may be the first offer given by the Investigating Officer to the appellant was not in so many terms clear so as to come within the purview of Section 50 of the Act which is mandatory in nature but subsequently when the DSP reached the spot, the offer given by him was according to Section 50 of the Act and, therefore, the appellant cannot derive any benefit from it. Mr. Sidhu then submits that the other argument advanced by the learned counsel for the appellant with regard to the non-preparation of Form No.29 at the spot, would not lend any support to the case of the appellant as in the case in hand all the formalities were completed at the spot in the presence of a senior Gazetted Officer (DSP Nachhattar Singh) who himself put his own seal on the entire case property and, therefore, there is no reason to doubt the recovery. According to the learned State counsel, the appellant hailed from another State and there was no reason to falsely implicate him in this case. Therefore, he, has no escape.

After hearing rival contentions of the either side and going through the entire record very minutely, I am of the view that the prosecution is stumbling badly primarily on the main vital flaw with regard to the non-compliance of Section 50 of the Act. The conceded position in the present case is that Section 50 was attracted

in this case as it was a search of a person as held in **State of Himachal Pradesh Vs. Pawan Kumar, 2005 (2) All India Criminal Law Authority 653**. As per the initial offer given by ASI Tara Singh which is reduced into memo Ex.P1, it is mentioned that he had asked the appellant as to whether he wanted to get the search conducted through him or Gazetted Officer or Magistrate. The said memo is signed by the appellant and the other two head constables as the record reveals. In his substantive statement, ASI Tara Singh has stated that after he had inquired from him (appellant) about his desire, he told him that he wanted to get his search conducted from a Gazetted Officer. This is the reason that he had called DSP (Nachhattar Singh). What I find from the substantive statement of ASI Tara Singh, is that he had very intelligently and cleverly made an attempt to overcome this weakness by saying that he had asked the appellant about the search to be conducted before a Gazetted Officer or a Magistrate. No doubt, on this aspect he has not been confronted from the appellant side in defence during the trial, but the prosecution cannot get out of a written document Ex.P1, a memo prepared in this regard and duly proved also. Had it been a case of an oral offer which is also considered to be complete one, the situation would have been otherwise. But now in the present set of circumstances, the prosecution is relying upon a writing (Ex.P1) and, therefore, I cannot ignore that fact.

I am appreciating this aspect, yet, from another angle. Since the appellant was given three offers initially by the Investigating Officer, there is every possibility that he might have chosen his search to be conducted before the Investigating Officer only for the reason that as per the provisions of Section 50 of the Act, the accused is to be produced as per his desire. Section 50 reads as under:-

> "**50. Conditions under which search of persons shall be concluded.-** (1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without necessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.
>
> (2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).
>
> (3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.
>
> (4) xx xx xx
>
> (5) xx xx xx
>
> (6) xx xx xx"

As per the facts of the present case, DSP Nachhattar Singh reached the spot after the first memo was prepared, rather on the basis of the first notice only. Therefore, the offer given by him,

regarding which separate memo Ex.P2 was prepared, was according to the provisions of Section 50 of the Act, the same would be of no consequence and the prosecution cannot build its case on the said offer. Addition or substraction of any name in the offer, in my view cannot be said to be permitted as per the strict compliance of Section 50 of the Act. If it is so, whole of the recovery becomes doubtful and this flaw alone is enough to discard the prosecution case.

My aforesaid view is strengthened by a judgment of this Court rendered in **Des Raj Vs. State of Punjab, 2005 (3) R.C.R. (Criminal) 334**.

In the backdrop of the aforesaid discussion, it can now safely be concluded that provisions of Section 50 of the Act have been clearly violated as appellant was not apprised of his statutory right which is mandatory in nature. This vital flaw touches the core of the case and is enough to discard the case of the prosecution in its entirety. Stringent provisions are provided under the Act with regard to the accused who are found in conscious possession of the contraband and in a case of non-commercial quantity, the minimum sentence provided is 10 years and a fine of Rs.1 lac. Therefore, before conviction of the accused is maintained, it becomes incumbent upon the prosecution to project a fair and flawless investigation and for any vital lacuna, benefit is to be extended to the accused.

Although, in my view, the aforesaid vital weakness in the

case of the prosecution is enough to disturb the impugned judgment of conviction, yet I find another infirmity in the investigation conducted by the prosecution agency. Admittedly, FSL form was not filled up at the spot. It is only the seal impression chit Ex.MO/1 which was prepared at the spot. After the appellant was produced before S.I. Darshan Singh, he had also put his own impression seal bearing inscription 'DS'. The said seal impression chit is pasted on Form No.29 which was sent to the FSL along with the sample. It was prepared on 9.3.1998 i.e. after 17 days of the alleged recovery. It is evident from Ex.P11, an application moved by SHO Darshan Singh before the Ilaqa Magistrate and the order Ex.P11/A passed thereon that the sample containing 10 grams and the remainder containing 990 grams of Charas were produced before him. This exercise was done for the purposes of obtaining the orders with regard to depositing the case property in the Malkhana. The orders passed by the concerned Magistrate are also in the same terms. Concededly, sample impression chit was not produced before the Ilaqa Magistrate and it remained with SI/SHO Darshan Singh throughout till the sample was despatched for analyst on 9.3.1998. Another material fact which is evident on record, is, that the entire case property was kept by SI/SHO Darshan Singh with him and he ultimately handed it over to Constable Balwinder Singh (PW1) on 9.3.1988. He was not the incharge of the Malkhana. There has to be some Moharar Head Constable for that purpose. I am conscious of the fact that the sample

impression chit contains the sample seal impression of DSP Nachhattar Singh also with the description 'NS' and the same is signed by him but non-production of the sample seal chit along with the case property before the Magistrate for the purposes of verification creates doubt in my mind about the sanctity of this particular chit which is on a loose paper. Therefore, the chances of preparation of this chit subsequently at any stage prior to the sending the sample to the FSL, cannot be ruled out. All the three seals which are put on the seal impression chit Ex.MO/1 remained with the police officials alone and, therefore, this fact also creates doubt in the mind of the Court with regard to the link evidence. This is the reason that emphasis has been laid time and again in different judgments of this Court that FSL Form (Form No.29) should be prepared at the spot at the time of effecting the recovery. The seal impressions should also be put on the same form which again should be produced along with the case property and the accused before the Ilaqa Magistrate for obtaining further orders of the concerned Court. In my view the said form should be signed by the Ilaqa Magistrate also after verifying all the seals and thereafter direction should be given to the Investigating Agency to deliver the sample to the Analyst without any delay may be on the same day or the following day but not beyond 72 hours. If all these safeguards are taken care of during the investigation, in my view, the accused would never be in a position to dent the case of the prosecution at least on the point of link evidence. Otherwise, non-

compliance thereof, as stated above, would certainly be seen with an eye of suspicion. My view gets strengthened by a latest judgment of this Court rendered in ***Bhola Singh Vs. State of Punjab*** *2005 (2) RCR (Criminal) 520.* I find the case of the prosecution weak on this aspect also and take the same into account along with the aforesaid vital infirmity qua Section 50 of the Act.

I do not want to detain myself by entering into detailed discussion with regard to the other submissions advanced by Ms. Bedi as primarily on the aforesaid two main flaws, I am of the firm view that the prosecution has not been able to prove the charge of Section 18 of the Act against the appellant beyond any shadow of reasonable doubt. Consequently, the impugned judgment of conviction and sentence is hereby set aside and he is acquitted of the charge.

The net result is that the instant appeal is allowed. The appellant is stated to be in custody. He shall be released forthwith if not required in any other case.

(Virender Singh)
Judge

December 14, 2006
'rana'